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No. 98-237

In The

Supreme Court of the United States

October Term, 1998

ROBERTSON, STEPHENS & COMPANY,

Petitioner,

v.

TONYJA DUFFIELD,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF THE EMPLOYERS GROUP AS *AMICUS CURIAE* IN SUPPORT OF THE PETITIONER

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BRIEF OF THE EMPLOYERS GROUP AS *AMICUS CURIAE* IN SUPPORT OF THE PETITIONER

This brief is submitted by the Employers Group as *amicus curiae* in support of the petitioner, Robertson, Stephens & Company.[1]

I. STATEMENT OF INTEREST

The Employers Group is a California non-profit corporation whose purpose is to facilitate the exchange of ideas and information concerning personnel and labor relations issues, and to represent its member employers in these areas with respect to legislative, judicial and administrative matters. The Employers Group is the largest California employer association, with over 5,000 member employers of all sizes and in every industry who employ in the aggregate approximately 2.5 million employees.

The Employers Group and its member employers have a substantial interest in this case. The Employers Group's members include securities industry employers who have an obvious interest in the outcome of this case. In addition, many California employers outside the securities industry have adopted alternative dispute resolution procedures for employment disputes whose enforceability is negatively affected by the broad sweep

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[1] This *amicus curiae* brief was funded solely by the Employers Group and authored entirely by counsel for the Employers Group. The parties have consented to the filing of this brief. Copies of the letters of consent have been filed with the Clerk of the Court.

of the Ninth Circuit's holding. Further, many other California employers have contemplated the adoption of arbitration procedures, but have deferred doing so because of uncertainty over the enforceability of such procedures caused by a series of Ninth Circuit decisions culminating in the present case. The Ninth Circuit stands alone among the circuit courts in refusing to enforce agreements to arbitrate Title VII claims. Further, the Ninth Circuit is at odds with California state courts in deciding that agreements to arbitrate are not enforceable as to state law discrimination claims under the California Fair Employment & Housing Act, Government Code §§ 12900 *et seq.* Thus, the Court's decision on the pending Petition will have important ramifications for California employers (as well as all other employers within the Ninth Circuit) both in and out of the securities industry.

The Employers Group is familiar with the questions involved in this case, having previously filed an *amicus* brief in support of Robertson, Stephens with the Ninth Circuit.

II. REASONS FOR GRANTING THE PETITION

A. THE NINTH CIRCUIT'S DECISION CONTRAVENES THE FUNDAMENTAL POLICIES OF THE FEDERAL ARBITRATION ACT BY CREATING A LACK OF FEDERAL UNIFORMITY AND INVITING COSTLY AND DELAYING PRE-ARBITRATION LITIGATION.

It is undisputed that the Ninth Circuit's decision (reported at 144 F.3d 1182) is in direct conflict with the decisions of many of the other circuit courts on the same

matter, one of the "special and important reasons" that favor the granting of a petition for a writ of certiorari under Supreme Court Rule 10. "One of the prime purposes of the certiorari jurisdiction is to bring about uniformity of decisions on these matters among the federal courts of appeals." R. STERN, E. GRESSMAN, S. SHAPIRO AND K. GELLER, SUPREME COURT PRACTICE 168 (BNA 7th ed. 1993). Here, the conflict at issue is particularly significant because it directly implicates the Federal Arbitration Act ("FAA").

One of the purposes of the FAA is to "create a body of federal substantive law of arbitrability" governing arbitration agreements involving commerce. *Moses H. Cone Memorial Hospital v. Mercury Const. Corp.*, 460 U.S. 1, 24 (1983). The preemptive nature of the FAA is intended to ensure "[u]niform national application of a federal substantive law. . . . " *Rosenthal v. Great Western Fin. Securities Corp.*, 14 Cal. 4th 394, 409, 926 P.2d 1061 (1996). However, under *Duffield* employers and employees within the Ninth Circuit will be unable to enforce agreements to arbitrate Title VII claims, state law discrimination claims, and potentially other federal statutory discrimination claims. Meanwhile, employees and employers in every other circuit which has addressed the same or an analogous issue (the First, Third, Fourth, Fifth, Seventh, Eighth and District of Columbia Circuits) can enforce such arbitration agreements under the FAA.[2]

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[2] See *Bercovitch v. Baldwin School, Inc.*, 133 F.3d 141, 149 (1st Cir. 1998); *Seus v. John Nuveen & Co.*, 146 F.3d 175, 178-179 (3d Cir. 1998); *Austin v. Owens-Brockway Glass Container, Inc.*, 78 F.3d 875, 882 (4th Cir.), *cert. denied*, 117 S.Ct. 432 (1996); *Miller v.*

If *Duffield* is not reviewed by this Court, the FAA will effectively be amended to provide that a written arbitration agreement involving commerce "shall be valid, irrevocable and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract, except in the Ninth Circuit, where agreements to arbitrate statutory employment discrimination claims are not enforceable." 9 U.S.C. § 2, as "amended" by *Duffield*.

Only by resolving the conflict raised by *Duffield* can the Court ensure that "the federal policy favoring arbitration" embodied in the FAA, *Moses H. Cone*, 460 U.S. at 24, is uniformly applied to arbitration agreements involving commerce throughout all of the states. Otherwise, employers and employees will be faced with conflicting rights and obligations concerning arbitration of statutory employment discrimination claims, and parties within the Ninth Circuit will lose the well-recognized benefits of arbitration that are available to parties to arbitration agreements elsewhere.

In addition to disrupting federal uniformity on the enforceability of arbitration agreements, *Duffield* also creates opportunities for a party to raise pre-arbitration challenges to arbitration agreements on numerous grounds. In this regard, *Duffield* opines in dicta that arbitration agreements are not enforceable as to claims under

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Public Storage Mgmt., Inc., 121 F.3d 215, 218 (5th Cir. 1997); *Matthews v. Rollins Hudig Hall Co.*, 72 F.3d 50, 54 n. 4 (7th Cir. 1995); *Patterson v. Tenet Healthcare, Inc.*, 113 F.3d 832, 837 (8th Cir. 1997); *Cole v. Burns International Security Services*, 105 F.3d 1465, 1472-73 (D.C. Cir. 1997). Cf. *EEOC v. Kidder, Peabody & Co., Inc.*, 1998 U.S. App. LEXIS 21066 (2d Cir. August 28, 1998).

the Americans with Disabilities Act ("ADA"). 144 F.3d at 1192 n. 10. *Duffield* also suggests that claims under the Age Discrimination in Employment Act ("ADEA") may no longer be arbitrable, based on the Ninth Circuit's erroneous view that this Court did not consider the 1990 amendments to the ADEA when it decided *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991). 144 F.3d at 1190 n. 5; but see *Gilmer*, 500 U.S. at 29 ("Congress . . . did not explicitly preclude arbitration or other nonjudicial resolution of claims, even in its recent amendments to the ADEA."). Further, the Ninth Circuit raised but did not rule on Duffield's claims that she did not "knowingly" agree to arbitrate her Title VII claims and that the New York Stock Exchange arbitration system would not adequately protect her statutory rights. 144 F.3d at 1190 n. 7.[3]

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[3] Prior to its decision in *Duffield*, the Ninth Circuit ruled that an agreement to arbitrate is enforceable as to statutory employment discrimination claims only when there is a "knowing" waiver of the judicial forum. See *Renteria v. Prudential Ins. Co. of America*, 113 F.3d 1104 (9th Cir. 1997); *Prudential Insurance Co. of America v. Lai*, 42 F.3d 1299 (9th Cir. 1994), *cert. denied*, 116 S.Ct. 61 (1995). These decisions impose a heightened standard of scrutiny specific to arbitration agreements, and so are contrary to the plain language and central intent of the FAA. As with its holding in *Duffield*, the Ninth Circuit stands virtually alone in imposing a heightened "knowing" standard, as numerous courts have rejected it. See, e.g., *Seus v. John Nuveen & Co.*, 146 F.3d at 183-184 n. 2 ("with respect to the referenced legislative history of section 118 . . . we understand 'knowingly and voluntarily' to invoke ordinary, well established principles of contract law rather than the heightened standard for which [the plaintiff] contends."); *Mouton v. Metropolitan Life Ins. Co.*, 147 F.3d 453 (5th Cir. 1998); *Battle v. Prudential Ins. Co. of America*, 973 F. Supp. 861, 866 (D. Minn. 1997) ("[*Lai*] ignored the clear federal policy favoring

Therefore, *Duffield* expressly or impliedly encourages pre-arbitration litigation with respect to ADA and ADEA claims, as well as broad challenges to the securities industry arbitration system that were seemingly foreclosed by *Gilmer*.

The opportunities for further challenges to arbitration obligations promoted by *Duffield* and prior Ninth Circuit decisions "would doubtless foster pre-arbitration litigation that would frustrate the very purpose of the [FAA]." *Allied-Bruce Terminix Companies, Inc. v. Dobson*, 115 S.Ct. 834, 843 (1995) (O'Connor, J., concurring). In this case, Duffield filed her complaint in January 1995, but the

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arbitration as well as the clear statutory language encouraging arbitration of Title VII claims."); *EEOC v. Frank's Nursery & Crafts, Inc.*, 966 F. Supp. 500, 503-04 (E.D. Mich. 1997) (rejecting *Lai*); *Cremin v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 957 F. Supp. 1460, 1474 (N.D. Ill. 1997) ("The prevailing view is that *Lai* is incompatible with [*Gilmer*], ignores core principles of contract law, and inappropriately used legislative history to contradict plain statutory meaning."); *Topf v. Warnaco, Inc.*, 942 F. Supp. 762, 771 (D. Conn. 1996) ("*Lai* is flawed in light of *Gilmer* and federal policies favoring arbitration"); *Johnson v. Hubbard Broadcasting, Inc.*, 940 F. Supp. 1447, 1455 (D. Minn. 1996) (agreeing with "widespread criticism" of *Lai*); *Beauchamp v. Great West Life Assur. Co.*, 918 F. Supp. 1091, 1096 (E.D. Mich. 1996) (Ninth Circuit's heightened "knowing" requirement "flies in the face of the language of [section 118], the Supreme Court's opinion in *Gilmer*, and fundamental principles of contract law."); *Pitter v. Prudential Life Insurance Co. of America*, 906 F. Supp. 130, 139 (E.D.N.Y. 1995) (*Lai* wrongly suggests "that federal law favoring arbitration and requiring liberal construction of arbitration agreements is not applicable to statutory claims of discrimination."); *Maye v. Smith Barney Inc.*, 897 F. Supp. 100, 107 (S.D.N.Y. 1995) ("*Lai* has been criticized by courts in this and other Circuits").

merits of her claims have yet to be litigated (whether in arbitration or the courts) almost four years later. Similar delays can be expected within the Ninth Circuit, and probably other circuits, as parties to arbitration agreements will continue to challenge the enforceability of those agreements on various theories either blessed or encouraged by the Ninth Circuit. The risks of these "kind of costs and delays through litigation" is contrary to the intent of Congress when it wrote the FAA, *Allied-Bruce*, 115 S.Ct. at 841, and it was certainly not the result intended by Congress when it drafted an amendment to Title VII which "encouraged" the use of arbitration to resolve disputes under Title VII.

B. THE PETITION ALSO SHOULD BE GRANTED TO CORRECT THE NINTH CIRCUIT'S ERRONEOUS TREATMENT OF STATE LAW DISCRIMINATION CLAIMS.

The Ninth Circuit also held in *Duffield* that by enacting Section 118 of the Civil Rights Act of 1991, Congress precluded the enforcement of arbitration agreements as to claims brought under **state** anti-discrimination laws. The court reached this conclusion even though Section 118 on its face applies only to Title VII and even though none of the legislative history on which it relied referred to state anti-discrimination laws. *Duffield* nevertheless concluded without cogent explanation that the "FEHA claims are arbitrable to the same extent as Title VII claims." 144 F.3d at 1187 n. 3. The court then relied on its erroneous ruling that Title VII claims are not arbitrable to conclude that FEHA claims are not arbitrable. This conclusion is at odds with the FAA, California's Arbitration

Act, the Supremacy Clause, decisions of this Court, and decisions of the California courts.

Duffield opined that FEHA claims are not arbitrable if Title VII claims are not arbitrable because the laws are "parallel." First, this thesis is incorrect as the FEHA differs in a number of respects from Title VII, including the types of prohibited discrimination covered by the laws and the available remedies.[4] Furthermore, the Ninth Circuit's holding is contrary to *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213 (1985). In *Byrd*, this Court reversed the Ninth Circuit and held that state law claims must be arbitrated even if similar federal statutory claims are not arbitrable. *Id.* at 221.

Additionally, this Court's decisions in *Barrentine v. Arkansas-Best Freight System, Inc.*, 450 U.S. 728 (1981), and *Perry v. Thomas*, 482 U.S. 483 (1987), implicitly establish that simply because a federal claim is not required to be arbitrated does not mean that a parallel state claim is not arbitrable. In *Barrentine*, this Court held that "Congress intended to give individual employees the right to bring their minimum wage claims under the [Fair Labor Standards Act] in court." 450 U.S. at 745.[5] However, in *Perry*

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[4] For example, the FEHA prohibits discrimination because of age, disability, "medical condition" and "marital status." Cal. Government Code § 12940(a). The FEHA also allows for unlimited recovery of compensatory and punitive damages, unlike Title VII as amended in 1991.

[5] *Barrentine* was subsequently limited by *Gilmer* to its distinct facts involving arbitration under a collective-bargaining agreement. Post-*Gilmer*, courts have enforced individual agreements to arbitrate FLSA claims. See, e.g., *Kuehner v. Dickinson & Co.*, 84 F.3d 316, 320 (9th Cir. 1996).

the Court ordered arbitration of California statutory wage claims even though the Fair Labor Standards Act, like Title VII, contains a provision authorizing the states to enforce parallel laws. See 42 U.S.C. § 2000e-7; 29 U.S.C. § 218(a).

The Ninth Circuit's holding that FEHA claims cannot be compelled into arbitration is also squarely in conflict with California's endorsement of arbitration of FEHA claims. See *24 Hour Fitness, Inc. v. Superior Court*, ___ Cal. App. 4th ___, 98 Daily Journal D.A.R. 10353, 10355 n. 9 (Sept. 30, 1998) (rejecting *Duffield* and holding that statutory discrimination claims under the FEHA are arbitrable); *Cione v. Foresters Equity Services, Inc.*, 58 Cal. App. 4th 625, 644, 68 Cal. Rptr. 2d 167 (1997); *Brookwood v. Bank of America*, 45 Cal. App. 4th 1667, 1674-75, 53 Cal. Rptr. 2d 515 (1996); *Spellman v. Securities, Annuities & Ins. Services, Inc.*, 8 Cal. App. 4th 452, 460-463, 10 Cal. Rptr. 2d 427 (1992). *Duffield* also ignores the strong California policy favoring arbitration embodied in the California Arbitration Act, Cal. Code of Civil Procedure § 1281 ("A written agreement to submit to arbitration an existing controversy or a controversy thereafter arising is valid, enforceable and irrevocable, save upon such grounds as exist for the revocation of any contract."). The Ninth Circuit's determination that FEHA claims have special immunity from the requirements of the California Arbitration Act is thus a serious infringement on a well-established California policy favoring arbitration of such claims.

Duffield creates a federal law basis for avoiding arbitration of FEHA claims that is not recognized by the California courts. As a result, parties who seek to avoid their agreement to arbitrate FEHA claims likely will file their cases in federal court in order to take advantage of

Duffield, and avoid an order to arbitrate under California law. The Ninth Circuit's implicit invitation to file state law employment discrimination claims in federal courts to avoid an agreed-upon obligation to arbitrate such claims will result in additional burdens on federal courts which already face overcrowded dockets and attendant litigation delays. Thus, not only will the "simplicity, informality and expedition of arbitration" be lost, *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985), but the delays and accompanying costs of litigation will increase.

III. CONCLUSION

The Ninth Circuit's decision creates an unwarranted impediment to a uniform federal and state policy favoring an efficient, inexpensive and workable alternative to the overcrowded dockets, burdensome litigation costs, and arbitrary jury verdicts experienced by civil litigants. For the foregoing reasons, the Court should grant the petition for writ of certiorari in order to provide necessary guidance to the courts, employers and employees in this significant area of employment law.

October 5, 1998

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